IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

WEDNESDAY, THE 8TH AUGUST 2007 / 17TH SRAVANA 1929

WP(C).No. 2459 of 2004(P)

PETITIONER:

JOSHY A.EDAKKARA, S/O. AUGUSTIAN,
EDAKKARA HOUSE, EZHACHERRY P.O.

BY ADV. SRI.MATHEW JOHN,
ADV. SRI.SUJESH MENON V.B.

RESPONDENT:

THE STATE BANK OF TRAVANCORE
BRANCH, MELUKAVUMATTOM, REPRESENTED BY ITS
BRANCH MANAGER.

BY ADV. SRI.SATHISH NINAN, SC, SBT,
ADV. SRI.SANTHOSH MATHEW.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 08/08/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C). NO.2459/2004-P:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P.1: COPY OF THE OBJECTION FILED BY THE PETITIONER DTD. 13/08/2002.

EXT.P.2: COPY OF THE AFFIDAVIT FILED BY THE RESPONDENT DTD. 17/10/2003.

EXT.P.3: COPY OF THE AFFIDAVIT FILED BY THE PETITIONER DTD. 22/10/2003.

EXT.P.4: COPY OF THE ORDER DTD. 31/10/2003 IN E.P. NO. 91/1997 IN O.S. NO. 231/1994 OF SUB COURT, PALA.

EXT.P.5: COPY OF THE SALE DEED NO. 423/1988 DTD. 23/02/1988.

EXT.P.6: COPY OF THE SALE DEED DTD. 28/12/1994.

EXT.P.5: COPY OF THE CASE SUMMARY AND DISCHARGE RECORD ISSUED TO PETITIONER FROM DEVAMATHA HOSPITAL, KOOTHATTUKULAM. (IN I.A. NO. 7509/2005).

EXT.P.6: COPY OF THE DIAGONOSIS CUM- PRESCRIPTION ISSUED BY THE PROFESSOR AND HEAD OF DEPARTMENT, CARDIOLOGY OF MEDICAL COLLEGE, KOTTAYAM DTD. 18/11/99.(IN I.A. NO. 7509/2005).

RESPONDENT'S EXHIBITS: NIL.

//TRUE COPY//

prv.

PIUS C. KURIAKOSE, J.

W.P.(C)No.2459 OF 2004

Dated this the 8th day of August, 2007

J U D G M E N T

The judgment debtor in a proceedings for execution of a money decree obtained against him by the respondent State Bank of Travancore, has filed this writ petition under Article 227 of the Constitution challenging Ext.P4 order under which his contentions have been overruled. All the contentions raised by him against the proposal to arrest him have been overruled and warrant has been ordered for his arrest. The execution petition was filed by the respondent for recovery of the decree debt of Rs.20,779.25 with interest and cost by arrest and detention of the petitioner/judgment debtor. The petitioner, in response to notice under Rule 37 of Order 21 contended that he is not liable to be arrested and detained since he is not possessed of sufficient means to pay off the decree debt and has not been willfully negligent in the matter of making payment. Ext.P1 is a copy of the objection filed by the petitioner. Ext.P2 is a copy of the affidavit sworn to by the manager of the respondent decree holder pointing out that the petitioner is possessed of various items of properties. Refuting the claims in Ext.P2, the petitioner filed Ext.P3

affidavit. According to the petitioner, in the enquiry which was conducted by the execution court regarding the liability of the petitioner to be arrested in execution, the evidence consisted solely of the oral testimonies of the manager of the respondent bank and the oral evidence of the petitioner. It is contended that the burden to prove that the petitioner judgment debtor was having sufficient means so as to enable him to pay the decree debt and that the judgment debtor was wilfully negligent in the matter of such payment was on the respondent decree holder and that the said burden has not been discharged by the decree holder. It is contended that Ext.P4 order passed by the court below directing issuance of warrant against the petitioner is illegal. Impugning Ext.P4 on various grounds, the petitioner has filed this writ petition seeking to quash Ext.P4 and seeking a declaration that the petitioner has no means to pay the decree debt.

2. A counter affidavit has been filed by the respondent bank. It is contended therein that Ext.P4 order was passed by the Executing Court in exercise of proper jurisdiction and after appreciating the evidence which came on record properly and hence there is no warrant for setting aside the Ext.P4. The total amount due from the writ

petitioner as on 7-2-2004 is Rs.55,329.25. The court below found after enquiry that the judgment debtor presently possesses landed property which is shown in Ext.A1 and has the means to pay the decree debt. The court below was right in coming to the conclusion relying on the admissions of the judgment debtor himself that the judgment debtor is staying in a multi storied building and is enjoying all the modern amenities in life. The decree holder in its evidence also asserted that the petitioner is leading a luxurious life and that there is clear proof of his willful failure to pay in spite of sufficient means. Answering the counter affidavit the petitioner has filed a reply affidavit. The petitioner contends through the reply affidavit that though several items of properties were referred to in the loan application submitted by the petitioner, the petitioner had to sell two items of properties mentioned in the loan application submitted by the petitioner. He became compelled to sell those items mentioned in Ext.A1 loan application for clearing off his liability which was outstanding with other creditors. He has produced copies of Ext. P5 sale deed dated 23-2-1998 and also Ext.P6 sale deed dated 28-12-1994. The amount realized by the sale of properties covered by Exts.P5 and P6 were also utilized for clearing his debts. Therefore the statement made by the

court in Ext.P4 that the petitioner continues to hold properties is incorrect. Reply affidavit goes on to deny the allegation that the petitioner is staying in a multi storied building and is enjoying all the most modern amenities in life.

3. Along with a separate affidavit petitioner has produced two more documents. One document is copy of the treatment summary and discharge record issued to the petitioner from Devamatha Hospital, Koothattukulam and the other document is copy of the diagnosis cum prescription issued by the Professor and Head of Department of Cardiology, Medical College, Kottayam.

4. I have heard the submissions of Sri.Mathew John, counsel for the petitioner and also those of Sri.Satish Ninan, counsel for the Bank. Sri.Mathew John would refer to Exts.P5 and P6 sale documents while Sri.Satish Ninan would read over to me the depositions of PW1 and DW1 in their entirety. Sri.Satish Ninan would rely on the observations in the judgment of a Division bench of this Court in Francis v. Central Bank of India, 1990(2) KLT 983 and would place very strong reliance on the judgment in Kuppuswamy v. P.G.Menon, 1992(2) KLT 203. Counsel argued that it is always open to the execution court on the basis of the materials placed before the court to draw an inference as

regards the statutory finding required by Section 51 of the C.P.C. If there is prima facie material on record about the means of the judgment debtor it is for the judgment debtor to rebut it since he is in a better position to know of his assets. "Means to pay the amount of the decree or substantial part thereof" only means that the judgment debtor should have realisable assets from which the necessary money can be raised or realised to pay up the decree amount. Where it is proved or admitted or otherwise becomes evident that the judgment debtor owns or possesses a house or has got interest therein, the normal presumption is that he is able to pay the debt either by sale or mortgage or creating other encumbrance of the house. In the instant case, the court below has arrived at findings on the basis of the evidence on record and there is no warrant for interfering with the order.

5. Having considered the rival submissions addressed at the Bar in the light of the judicial precedents cited at the Bar particularly the judgment of Paripoornan, J. in Kuppuswamy's case I am of the view that there is no warrant for interfering with Ext.P4 under the supervisory jurisdiction of this court under Article 227. Supervisory jurisdiction under Article 227 will be invoked only in exceptional

circumstance. It is not possible to say that Ext.P4 is not based on any evidence. Nor is it possible to say that the findings entered in Ext.P4 are unreasonable or perverse. Before the court below also order of arrest was sought to be declined on the ground of health condition of the petitioner and it is seen from Ext.P4 that such ground was rejected on the reason that no documentary evidence has been produced by the petitioner. In this court along with the application for reception of additional documents medical evidence regarding the petitioner's health condition was produced. But in my opinion the health condition of the petitioner will assume relevance only when the court below passes an order committing the petitioner to Jail and not when the court below decides question of liability of petitioner to arrest. The court below will, while the petitioner is brought under arrest, examine the question whether he is entitled to be released on health reasons. The petitioner is permitted to produce the documents he has produced in this court at the time when he is arrested and produced before the court below. Challenge against Ext.P4 fails and the writ petition will stand dismissed. However, on conditions of indulgence I am inclined to extend the order of stay passed by this court in respect of Ext.P4 on condition that the order of stay will

remain in force if the petitioner pays to the decree holder at the rate of Rs.3000/- every month commencing from the first of March 2008 till the entire decree debt as claimed by the respondent is wiped off. In the event of any two defaults the order of stay will stand vacated and the petitioner will become liable to be arrested forthwith in implementation of Ext.P4.

The writ petition is disposed of as above.

(PIUS C.KURIAKOSE, JUDGE)

ksv/26208